

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN E. MANDERS, as Trustee in Bankruptcy of
the Estates of PETERSON & WILSON, a
Partnership, G. HAZELTON WILSON and
GEORGE PETERSON, Individuals, Bank-
rupts,

Appellants,

vs.

GEORGE H. WILSON and ELLA H. WILSON,
His Wife,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

Nov 15 1915

F. D. Monckton

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Admission of Service of Citation on Appeal..	16
Assignment of Errors on Appeal.....	14
Certificate of Clerk U. S. District Court to Tran- script on Appeal.....	17
Citation on Appeal.....	19
Demurrer	9
Judgment	12
Opinion and Order Sustaining Demurrer.....	11
Petition for Appeal and Order Allowing Appeal.	13
Praecept for Transcript of Record for Use on Appeal	1

*In the District Court of the United States, in and
for the Northern District of California. First Di-
vision.*

JOHN E. MANDERS, as Trustee in Bankruptcy of
the Estates of PETERSON & WILSON, a
Partnership, G. HAZELTON WILSON, and
GEORGE PETERSON, Individuals, Bank-
rupts,

Plaintiff,

vs.

GEORGE H. WILSON and ELLA H. WILSON,
His Wife,

Defendants.

**Praeipce for Transcript of Record for Use on
Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the
above-entitled matter to be used by the above-named
plaintiff on appeal to the United States Circuit Court
of Appeals, for the Ninth Circuit, from the judgment
of the above-entitled court made and entered herein
on the 15th day of September, 1915, sustaining the
demurrer of the above-named defendants to the com-
plaint of the plaintiff on file herein and dismissing
the said action. Please include in the said trans-
cript of record the following documents:

- (1). This Praeipce.
- (2). Complaint in the Above-entitled Action.
- (3). The Demurrer of the Defendants in the
Above-entitled Action.

(4). Opinion and Order of the District Judge Sustaining the Said Demurrer.

(5). The Judgment in the Above-entitled Action.
Dated, October 2, 1915.

REUBEN G. HUNT,
Attorney for Plaintiff.

Receipt of a copy of the foregoing Praecipe is hereby admitted this 4th day of October, 1915.

HAROLD L. LEVIN and
H. I. STAFFORD,

Attorneys for Defendants Above Named. [1*]

[Endorsed]: Filed Oct. 6, 1915. W. B. Maling,
Clerk By C. W. Calbreath, Deputy Clerk. [2]

(Title of Court and Cause.)

COMPLAINT TO SET ASIDE DEED.

Now comes the plaintiff above-named and complaining of the defendants above named alleges:

I.

The above-named plaintiff and each of the above-named defendants are citizens of the United States and reside in the City and County of San Francisco, State of California.

II.

The above-entitled action is commenced in the above-entitled court by the above-named trustee in bankruptcy under and by virtue of the provisions of Section 70 (e) of the Bankruptcy Act taken in conjunction with Section 23 (b) of the same Act, for the

*Page-number appearing at foot of page of certified Transcript of Record.

purpose of setting aside the transfer of property hereinafter mentioned.

III.

At and during all the dates and times herein mentioned the New England Casualty Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts and authorized to do business in, and engaged in business, in the State of California. [3] ,

IV.

At and during all the dates and times herein mentioned the defendants, George H. Wilson and Ella H. Wilson, were and now are husband and wife.

V.

On the 31st day of October, 1914, a petition in involuntary bankruptcy was filed in the above-entitled court against the above-named bankrupts, and thereafter and on the 26th day of January, 1915, the said Court made an order, which said order was duly given and made, adjudicating the said partnership and the said individuals bankrupts upon the said petition and referring further proceedings in the matter of the administration of the estate of the bankrupts to A. B. Kreft, Esq., a referee in bankruptcy of the said court. Thereafter and on the 27th day of February, 1915, the above-named John E. Manders was appointed trustee of the estates of the said bankrupts by their creditors at their first meeting, which said appointment was thereupon and on said 27th day of February, 1915, approved by the said referee. Thereafter and on the said 27th day of February, 1915, the said John E. Manders qualified as such trustee

and ever since the said 27th day of February, 1915, the said John E. Manders has been, and now is, the appointed, qualified and acting trustee of the estates of the said bankrupts.

VI.

On the 27th day of September, 1911, and for a long time prior thereto, the above-named bankrupt G. Hazelton Wilson was the sole owner of, and in the actual possession of, and appeared upon the records of the hereinafter-mentioned County of Alameda as the sole owner of, and continuously thereafter until the 23d day of October, 1914, appeared upon the said records as the sole owner of, the following described real property situated, lying and being in the City of Oakland, County of Alameda, State of California: [4]

The North Half of Lot No. 40, Block D, as laid down and delineated upon that certain map entitled: "Highland Terrace Map No. 2," on record in the office of the County Recorder of the County of Alameda, State of California.

Thereafter and on said 27th day of September, 1911, the said bankrupt G. Hazelton Wilson executed and delivered to defendant George H. Wilson, his father, and to defendant Ella H. Wilson, his mother, a deed to the said real property, either in payment of an alleged pre-existing indebtedness of \$2,000.00 or as a mortgage to secure such indebtedness. Whether the said deed was given in payment of such alleged indebtedness or as a mortgage to secure such alleged indebtedness, plaintiff is unable to state. The said deed remained in the possession of the said

George H. Wilson from the said 27th day of September, 1911, until the 23d day of October, 1914, and was not placed on record until the said 23d day of October, 1914, when it was recorded in the office of the County Recorder of the said County of Alameda, in Liber 2294 of Deeds at page 168, records of said Alameda County.

VII.

At and during all the dates and times herein mentioned down to and including the 23d day of October, 1914, the day when the said deed was recorded, the said bankrupt G. Hazelton Wilson was in open, notorious and exclusive possession of the said real property and was the reputed and apparent owner thereof, and neither the said George H. Wilson nor the said Ella H. Wilson ever had possession of the said real property, or any part thereof, or was the reputed or apparent owner thereof, at or during any of said dates or times. The said deed was withheld from record as aforesaid by the said defendant George H. Wilson and the said defendant Ella H. Wilson in order not to affect the credit of the said bankrupt G. Hazelton Wilson, and the credit of the said bankrupt partnership, and in order to enable the said bankrupt partnership to extend its credit, upon the reputed and apparent [5] ownership of the said real property in the said bankrupt G. Hazelton Wilson.

VIII.

On or about the 6th day of July, 1914, the said bankrupt partnership and the said individual bankrupt G. Hazelton Wilson falsely and fraudulently represented to the said corporation that the said

bankrupt partnership was the owner of, without any encumbrance thereon, and in the possession of, the said real property, through and by the said individual bankrupt G. Hazelton Wilson, as was disclosed by the records of Alameda County, and relying solely upon the said representations, and not otherwise, and without any knowledge of their falsity, and without any knowledge of the said transfer mentioned in Paragraph VI above, the said corporation extended credit to the said bankrupt partnership in this: (1). That on the 6th day of July, 1914, it executed its bond No. 17914 on behalf of the said bankrupt partnership in favor of the Board of Education of the City of Santa Cruz, State of California, guaranteeing the faithful performance of a certain contract dated July 3, 1914, entered into between the said Board of Education of the City of Santa Cruz and the said bankrupt partnership for the general construction of a grammar school building to be erected in the said City of Santa Cruz, the penalty of the said bond being \$32,880.00. The said bankrupt partnership failed to properly perform and complete said contract, and the said corporation by reason of the conditions of the said bond was compelled to and did complete said contract, and by reason of the completion of said contract and the giving of said credit the said corporation, prior to the filing of the said petition in bankruptcy, suffered a loss exceeding \$2,500.00, no part of which has been paid to said corporation. On the said 6th day of July, 1914, the time of the execution of the said bond, the bankrupt partnership agreed in writing with

the said corporation to [6] to indemnify the said corporation for all losses it might sustain by reason of the giving of the said bond. (2). That on the 8th day of July, 1914, it executed its bond No. — on behalf of the said bankrupt partnership in favor of the Board of Trustees of the Town of Yreka, State of California, guaranteeing the faithful performance of a certain contract dated July, 1914, entered into between the said Board of Trustees of the town of Yreka and the said bankrupt partnership for the general construction of a free public library building in the said town of Yreka, the penalty of the said bond being \$7,000. The said bankrupt partnership failed to properly perform and complete said contract, and the said corporation by reason of the conditions of the said bond was compelled to and did complete said contract, and by reason of the completion of said contract and the giving of said credit the said corporation, prior to the filing of the said petition in bankruptcy, suffered a loss exceeding \$2,500.00, no part of which has been paid to said corporation. On the said 8th day of July, 1914, the time of the execution of the said bond, the bankrupt partnership agreed in writing with the said corporation to indemnify the said corporation for all losses it might sustain by reason of the giving of the said bond.

The said corporation did not discover the falsity of the said representations, or the falsity of any of them, until the said 23d day of October, 1914, when the said deed was recorded as aforesaid.

IX.

At and during all the dates and times herein men-

tioned the said real property was, and now is, of a value of about \$2,000.

X.

The total amount of claims filed and allowed against the estate of the bankrupt partnership in the **said bankruptcy proceeding** exceeds \$2,5000.00, and the total assets of the [7] bankrupt partnership do not exceed \$4,000, and there are no assets in the estate of either individual bankrupt.

XI.

The said defendant George H. Wilson and the said defendant Ella H. Wilson threaten to, and will unless restrained by an order of the above-entitled court, immediately sell, assign, transfer or in some wise dispose of the said real property, or some part thereof to an innocent third party either for value or otherwise, and thereby place the said real property out of the reach of the said trustee in bankruptcy in the event that he is successful in this action.

WHEREFORE, plaintiff plays that an order may issue herein restraining the said defendant George H. Wilson and the said defendant Ella H. Wilson from selling, assigning, transferring, or in anywise disposing of the said real property, or any part thereof, until the further order of this Court; that a decree may be entered herein setting aside and annulling the said transfer and declaring that the said real property is a part and parcel of the estate of the bankrupt partnership; that the said decree may provide that the said defendant George H. Wilson and the said defendant Ella H. Wilson may have ten days in which to execute and deliver to the trustee

in bankruptcy a deed to the said real property, upon the failure of which at the end of said time a commissioner may be appointed by this Court to execute such a transfer on behalf of the said defendants to and for the use of the said trustee in bankruptcy; and for such other and further relief as to the Court shall seem meet and proper, and for the costs of this action

REUBEN G. HUNT,
Attorney for Plaintiff.

(Duly verified.)

[Endorsed]: Filed Jul. 7, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [8]

(Title of Court and Cause.)

Demurrer.

Defendants demur to plaintiff's complaint and specify:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

II.

That the said complaint is uncertain in this: That it does not appear therein, neither can it be ascertained therefrom, whether or not the defendants had knowledge, or cause to believe, that the grantor, G. Hazelton Wilson, was bankrupt or insolvent at the time of the delivery of the said deed to the said defendants, or that the said defendants or either of them contributed to, or had knowledge of the alleged fraud at the time of the delivery of the said deed, or

at any time thereafter.

III.

That the said complaint is uncertain in this: That it cannot be ascertained therefrom, neither does it appear therein whether or not the said deed was delivered to the defendants [9] with intent to defraud the creditors if the grantor;

IV.

That the said complaint is ambiguous for the same reason as it is uncertain as set forth in paragraphs II and III hereof and that the said complaint is unintelligible for the same reason as it is ambiguous.

WHEREFORE the defendants pray to be hence dismissed with their costs and that the plaintiff take nothing by his complaint herein.

HAROLD L. LEVIN,

H. I. STAFFORD,

Attorneys for the Defendants, George H. Wilson and
Ella Wilson (His Wife).

We hereby certify that the within demurrer is well taken in point of law and is not interposed for purpose of delay.

HAROLD L. LEVIN,

H. I. STAFFORD,

Attorneys for Defendants.

Receipt of Copy of within Demurrer admitted this
23d day of August, 1915.

R. G. HUNT,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 24, 1915. W. B. Maling,
Clerk By C. W. Calbreath, Deputy Clerk. [10]

(Title of Court and Cause and Number.)

[Opinion and Order Sustaining Demurrer.]

REUBEN G. HUNT, Esq., Attorney for Plaintiff.

HAROLD L. LEVIN, Esq., and H. I. STAFFORD, Esq., Attorneys for Defendants.

This is an action by a trustee in bankruptcy to set aside a deed executed and delivered by the bankrupt to the defendants on September 27th, 1911, but not recorded until October 23d, 1914. There is no fraud alleged in connection with the original execution and delivery of the deed, but it is sought to set it aside upon an allegation that it was withheld from record by the defendants in order not to affect the credit of the grantor, and in order to enable him to extend his credit upon the reputed ownership of the property involved. The complaint also avers that a certain corporation did extend credit to the grantor upon his reputed ownership of the land in question. Section 70-e of the bankruptcy act provides that "a trustee may avoid any transfer by the bankrupt of his property—which any creditor of such bankrupt might have avoided, etc." But of course this means "which any creditor might have avoided" under the laws of the State where the transaction occurred. Whatever may be the rule in other states, [11] or at the common law, no law, nor any decision has been called to my attention which would permit the corporation extending credit to the grantor to avoid a deed not otherwise fraudulent in this State, because of failure

to record it. Indeed it was early held here that failure to record a transfer of real property renders such transfer void only as against subsequent purchasers of incumbrancers in good faith and for value.

Section 1214 Civil Code;

Prow vs. Rose, 4 Cal. 173;

Pixley vs. Higgins, 15 Cal. 127.

Nor does there appear in the complaint the necessary elements of an estoppel such as would prevent the defendants from asserting title.

The demurrer to the complaint is therefore sustained.

September 13th, 1915.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Sep. 13, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]

(Title of Court and Cause and Number.)

Judgment.

In this cause, the Court having ordered that Defendants Demurrer to the Complaint be sustained, without leave to amend, and that Judgment be entered accordingly:

NOW THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action and that the defendants go hereof without day.

JUDGMENT ENTERED this 13th day of September, A. D. 1915.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [13]

(Title of Court and Cause.)

Petition for Appeal and Order Allowing Appeal.

John E. Manders, as trustee in bankruptcy of the estates of Peterson & Wilson, a partnership, and G. Hazelton Wilson and George Peterson, Individuals, Bankrupts, the plaintiff above named, considering himself aggrieved by the judgment of the above-entitled court made and entered on Tuesday, the 15th day of September, 1915, in the above-entitled action sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated, October 2, 1915.

REUBEN G. HUNT,
Attorney for Plaintiff. [14]

The foregoing appeal is allowed.

Dated, October 2d, 1915.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Oct. 2, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

(Title of Court and Cause.)

Assignment of Errors on Appeal.

Now on this the 1st day of October, 1915, comes John E. Manders, as trustee in bankruptcy of the estates of Peterson & Wilson, as partnership, G. Hazelton Wilson and George Peterson, Individuals, Bankrupts, the plaintiff in the above-entitled action, by Reuben G. Hunt, his attorney, and says that the judgment in the above-entitled action made and entered herein on the 15th day of September, 1915, sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action, is erroneous and against his just right for the following reasons:

(1) Said complaint states facts sufficient to constitute a cause of action against the above-named defendants.

(2) It was not necessary in order to state facts sufficient to constitute a cause of action that said complaint should have alleged that the grantor of the deed named in said complaint, to wit, the bankrupt G. Hazelton Wilson, was insolvent at the time of the delivery of the said deed to the above-named defendants.

(3) It was not necessary in order to state facts sufficient [16] to constitute a cause of action that said complaint should have alleged that the above-named defendants or either of them, contributed to, or had knowledge, of the fraud set forth in the said complaint at the time of the delivery of the said deed, or at any time thereafter.

(4). It was not necessary in order to state facts sufficient to constitute a cause of action that the said complaint should have alleged that the said deed was delivered to the defendants with intent to defraud the creditors of the said grantor, the bankrupt G. Hazelton Wilson.

(5). The said complaint was not uncertain because it lacked the allegations contained in 2, 3, or 4 above or any of them.

(6). The said complaint was not ambiguous because it lacked the allegations contained in 2, 3 or 4 above or any of them.

WHEREFORE, the said John E. Manders, as trustee in bankruptcy of the estates of Peterson & Wilson, a partnership, and G. Hazelton Wilson and George Peterson, Individuals, Bankrupts, the plaintiff in the above-entitled action, prays that the said judgment of the said District Court may be reversed, with directions to said District Court to overrule the said demurrer and require the above-named defendants to answer the said complaint.

Dated, October 2, 1915.

REUBEN G. HUNT,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 2, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

(Title of Court and Cause and Number.)

Admission of Service of Citation on Appeal.

Due service of the Citation on Appeal herein, the original of which was filed in the above-entitled court on October 2, 1915, is hereby admitted this 2d day of October, 1915.

HAROLD L. LEVIN and
H. I. STAFFORD,

Attorneys for the Above-named Defendants.

[Endorsed]: Filed Oct. 15, 1915, at 4 o'clock and 30 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [18]

(Title of Court and Cause.)

Stipulation for Diminution of Record.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that in making up the record on appeal by the above-named plaintiff from the judgment of the above-entitled court made and entered herein on the 15th day of September, 1915, sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action, the clerk of the above-entitled court shall in following the Praecipe now on file herein omit the full title of court and cause except upon the said Praecipe and thereafter refer to the same simply as "Title of Court

and Cause” and omit all verifications and refer to the same simply as “Duly Verified.”

Dated, October 2, 1915.

REUBEN G. HUNT,
Attorney for Plaintiff.
HARROLD L. LEVIN,
H. I. STAFFORD,
Attorneys for Defendants.

[Endorsed]: Filed Oct. 6, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [19]

**Certificate of Clerk, U. S. District Court to
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 19 pages, numbered from 1 to 19, inclusive, to contain full, true, and correct copies of certain records and proceedings in the case of John E. Manders, as Trustee, etc., vs. George H. Wilson and Ella H. Wilson, His Wife, No. 15,852, as the same now remain on file and of record in this office; said copies having been prepared pursuant to and in accordance with “Praeceptum for Transcript of Record for use on Appeal” (a copy of which is included in the foregoing transcript), and the instructions of Reuben G. Hunt, Esq., Attorney for Plaintiff herein.

I further certify that the cost for preparing and certifying the foregoing copies is the sum of Seven Dollars and sixty cents (\$7.60), and that the same has been paid to me by said attorney for plaintiff.

Annexed hereto and paged 21, 22, and 23, is the original Citation on Appeal, issued herein.

WITNESS the Honorable M. T. DOOLING, Judge of the District Court of the United States, for the Northern District of California, this 28th day of October, A. D. 1915.

WALTER B. MALING,
Clerk,
By C. W. Calbreath,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
10/28/15. C. W. C.] [20]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

JOHN E. MANDERS, as Trustee in Bankruptcy of
the Estates of PETERSON & WILSON, a
Partnership, G. HAZELTON WILSON and
GEORGE PETERSON, Individuals, Bank-
rupts,

Plaintiffs,

vs.

GEORGE H. WILSON and ELLA H. WILSON,
his Wife,

Defendants.

Citation on Appeal.

United States of America,

Ninth Circuit.—ss.

To George H. Wilson and Ella H. Wilson, his wife,
Defendants Above Named, and to H. I. Stafford
and Harold Levin, Their Attorneys:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco, in said district, on the 30th day of October, 1915, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States in and for the Northern District of California, First Division, in the above-entitled matter, to show cause, if any there be, why the judgment of the said District Court rendered, made and entered herein on the 15th day of September, 1915, sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [21]

WITNESS, the Honorable M. T. DOOLING, Judge of said District Court this 2d day of October, 1915, in the year of Our Lord one thousand nine hundred and fifteen and in the independence of the United

States of America the one hundred and fortieth.

M. T. DOOLING,
United States District Judge.

Attorneys for the Above-named Defendants. [22]

[Endorsed]: 15,852. U. S. District Court, Northern District of California, First Division. John E. Manders, etc., Plaintiff, vs. George H. Wilson, et al., Defendants. Citation on Appeal. Filed Oct. 2, 1915. W. B. Maling, Clerk. My C. W. Calbreath Deputy Clerk. [23]

[Endorsed]: No. 2671. United States Circuit Court of Appeals for the Ninth Circuit. John E. Manders, as Trustee in Bankruptcy of the Estates of Peterson & Wilson, a Partnership, G. Hazelton Wilson and George Peterson, Individuals, Bankrupts, Appellants, vs. George H. Wilson and Ella H. Wilson, His Wife, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed October 28, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.